

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on November 5, 2014 appellant, then a 52-year-old rural carrier, sustained a sprain of his left shoulder (trapezius). He stopped work on November 5, 2014 and returned to full-time work on November 9, 2014. Appellant stopped work again on December 8, 2014. On February 23, 2015 he filed a Claim for Compensation (Form CA-7) claiming wage loss for the period January 22 to February 20, 2015, and he later filed Forms CA-7 claiming wage loss for various periods after February 20, 2015. On April 3, 2015 appellant received compensation on the daily rolls for wage loss beginning February 28, 2015. He received two more payments on the daily roll before being placed on the periodic rolls beginning May 3, 2015.

In a May 12, 2015 letter, OWCP informed appellant that, beginning May 3, 2015, he had total disability compensation on the periodic rolls every 28 days. It advised him that, to minimize the possibility of an overpayment of compensation, he must notify it immediately when he went back to work. OWCP informed appellant that, if he worked for any portion of the period for which he received compensation, he must return the payment to OWCP even if he had already advised it that he was working.²

In an October 9, 2015 report, Dr. Shawn Hsieh, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant could return to full-duty work with no limitations or restrictions on October 19, 2015.

On October 19, 2015 appellant returned to full-duty work for the employing establishment.

The record reflects that, on December 14, 2015, a human resources official from the employing establishment, L.M., telephoned an OWCP claims examiner, S.C., and advised that appellant had returned to work a “month and a half ago.” On December 15, 2015 the human resources official telephoned another OWCP official, D.M., and advised that appellant returned to work on October 19, 2015.

In a March 7, 2016 notice,³ OWCP advised appellant of its preliminary determination that he received a \$4,226.31 overpayment of compensation for the period October 19 to December 12, 2015 because he received total disability compensation for this period after he

² OWCP advised appellant that, for payments sent by electronic fund transfer (EFT), a notification of the date and amount of payment appears on the statement from his financial institution and that he was expected to monitor his EFT deposits carefully, at least every two weeks. OWCP informed appellant that, if he worked for any portion of the period for which a deposit was made, he must advise OWCP immediately.

³ OWCP first sent appellant a preliminary overpayment notice dated February 10, 2016 alleging a \$4,732.52 overpayment, but it recalculated the alleged overpayment to \$4,226.31 and sent him a new amended notice dated March 7, 2016. In connection with the February 10, 2016 preliminary overpayment notice, per OWCP’s request, appellant submitted an Overpayment Recovery Questionnaire (Form OWCP-20) in which he listed monthly income of \$2,300.00, monthly expenses of \$2,320.00, and zero assets. Appellant indicated that the overpayment was not his fault because he was supposed to get compensation starting January 27, 2015 but did not receive it until two months later. He also noted that he still thought OWCP owed him compensation “dating back to [January 27, 2015].”

returned to full-time work on October 19, 2015.⁴ OWCP also made a preliminary determination that he was at fault in the creation of the overpayment. It advised appellant that he could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. OWCP informed him that he could submit additional evidence in writing or at prerecoupment hearing, but that a prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. It requested that appellant complete and return an enclosed Form OWCP-20 within 30 days even if he was not requesting waiver of recovery of the overpayment.

Appellant requested a prerecoupment telephone hearing with a representative of OWCP's Branch of Hearings and Review. During the hearing held on February 7, 2017, appellant testified that he did not believe he was at fault in the creation of the \$4,226.31 overpayment. He asserted that he did not receive his first compensation check for his November 5, 2014 employment injury until June 2015 and that he thought that the EFT deposits he received from OWCP after his October 19, 2015 return to work constituted wage-loss compensation that OWCP owed him for December 2014 through June 2015.⁵ Appellant noted that, after he received the November 2015 EFT deposit, he called an OWCP claims examiner, and left a message advising him that he had returned to work. He indicated that, after he received the December 2015 EFT deposit, he advised a human resources official at the employing establishment, L.M., that he had returned to work, and that she in turn advised OWCP of this fact. Appellant also noted, "Now if I was overpaid in November and December[,] why in April 2016 did they send me additional money, \$1,500 [?]...."⁶ He testified that he had \$2,400.00 in monthly income, and \$2,120.00 in monthly expenses comprised of rent (\$700.00), food (\$800.00), clothing (\$100.00), utilities (\$120.00), and miscellaneous household expenses (\$400.00). Appellant also testified that he had no assets other than his home, household furnishings, and car.

⁴ The evidence of record contains payment records and calculation sheets showing that appellant received \$4,226.31 in compensation for the period October 19 to December 12, 2015. The payment records reflect that, on November 14, 2015, appellant received a \$2,165.86 EFT deposit covering the period October 18 to November 14, 2015 and that, on December 12, 2015, he received a \$2,137.80 EFT deposit covering the period November 15 to December 12, 2015. The November 14, 2015 payment included payment of compensation for one day (October 18, 2015) that appellant was off work prior to his October 19, 2015 return to work, and OWCP excluded the compensation appellant received for October 18, 2015 when it calculated the \$4,226.31 overpayment for the period October 19 to December 12, 2015.

⁵ The evidence of record reflects that, by the time appellant received the November 14 and December 12, 2015 EFT deposits, all the monies that he received for wage loss between February 28 and July 1, 2015 had been paid to him by July 25, 2015. At the February 7, 2017 hearing, appellant asserted he still had not received wage-loss compensation for March 2015. The evidence of record shows that he received his first EFT deposit on April 3, 2015, a deposit which covered wage loss for the period February 28 to March 27, 2015, and that on April 24, 2015 he received an EFT deposit for the period March 28 to April 17, 2015.

⁶ The evidence of record shows that on July 8, 2016 appellant received an \$1,508.53 EFT deposit for the period January 22 to February 9, 2015. The payment record indicated that, for the period February 10 to 20, 2015, appellant was paid through leave/holiday pay or worked and that, for the period February 21 to 27, 2015, he did not claim compensation. The evidence of record further reflects that appellant had not established entitlement to wage-loss compensation for the period January 22 to February 9, 2015 until OWCP issued its July 5, 2016 decision granting wage-loss compensation for this period.

In a March 10, 2017 decision, OWCP's hearing representative determined that appellant received an overpayment of compensation in the amount of \$4,226.31. He found that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP required that appellant repay the overpayment by paying \$200.00 each month.⁷

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁸ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.⁹

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.¹⁰ Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹¹

ANALYSIS -- ISSUE 1

The evidence of record shows that appellant returned to full-time work for the employing establishment on October 19, 2015, but received total disability compensation in the amount of \$4,226.31 after his return to work. The record contains OWCP payment records and calculations showing that appellant received \$4,226.31 in total disability compensation for the period October 19 to December 12, 2015.¹² However, appellant was entitled to receive such total disability compensation after he returned to full-time work for the employing establishment on

⁷ With respect to the recovery of an overpayment, the Board's jurisdiction is limited to those cases where OWCP seeks recovery from continuing compensation benefits. *D.R.*, 59 ECAB 148 (2007); *Miguel A. Muniz*, 54 ECAB 217 (2002). As appellant was not in receipt of continuing compensation at the time of OWCP's overpayment determination, the Board does not have jurisdiction over the method of recovery of the overpayment in this case. *See Lorenzo Rodriguez*, 51 ECAB 295 (2000); 20 C.F.R. § 10.441.

⁸ 5 U.S.C. § 8102(a).

⁹ *Id.* at § 8129(a).

¹⁰ *Id.* at § 8116(a). The Board has held that a claimant is not entitled to receive temporary total disability and actual earnings for the same period. *See M.S.*, Docket No. 16-0289 (issued April 21, 2016).

¹¹ 20 C.F.R. § 10.500(a).

¹² *Supra* note 5.

October 19, 2015.¹³ For these reasons, the Board finds that OWCP properly found that appellant received a \$4,226.31 overpayment of compensation.

LEGAL PRECEDENT -- ISSUE 2

Section 8129(b) of FECA provides that adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹⁴ A claimant who is at fault in the creation of an overpayment is not entitled to waiver.¹⁵ Section § 10.433 of OWCP's regulations provides that an individual will be found at fault in the creation of an overpayment of compensation who: (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; (2) failed to provide information which he or she knew or should have known to be material; or (3) accepted a payment which he or she knew or should have known to be incorrect."¹⁶

The Board has held that an employee who receives payments from OWCP in the form of direct deposit may not be at fault the first time incorrect funds are deposited into his or her account, as the acceptance of the resulting overpayment lacks the requisite knowledge.¹⁷ It is not appropriate to make a finding that a claimant has accepted an overpayment through direct deposit until such a time as a reasonable person would have been aware that this overpayment had occurred.¹⁸ The Board has also held in cases involving a series of incorrect payments, where the requisite knowledge is established by a letter or telephone call from OWCP or simply with the passage of time and a greater opportunity for discovery, the claimant will be at fault for accepting the payments subsequently deposited.¹⁹

ANALYSIS -- ISSUE 2

In the present case, OWCP found that appellant was at fault because he had accepted compensation payments that he knew or should have known were incorrect.²⁰ The Board notes that a complete analysis of the fault issue, when a claimant has returned to work and continues to

¹³ See *supra* notes 10 and 11. On appeal appellant argues that the compensation checks he received in November and December 2015 were for monies that were part of the wage-loss compensation to which he was entitled due to his work-related injuries. However, the evidence of record shows that these monies covered a period after he returned to work on October 19, 2015, a point at which he would not have been entitled to receive total disability compensation.

¹⁴ 5 U.S.C. § 8129(b).

¹⁵ *Gregg B. Manston*, 45 ECAB 344, 354 (1994).

¹⁶ 20 C.F.R. § 10.433.

¹⁷ *D.B.*, Docket No. 15-0258 (issued February 1, 2016).

¹⁸ *P.L.*, Docket No. 16-0127 (issued May 3, 2016).

¹⁹ *Tammy Craven*, 57 ECAB 689, 693 (2006).

²⁰ See *supra* note 16.

receive compensation, must properly consider the first payment after the return to work. After his return to work on October 19, 2015, appellant received a \$2,165.86 direct deposit by EFT on November 14, 2014, representing his compensation for the period October 18 to November 14, 2015. The question is whether he had, at the time of the first deposit, accepted a payment he knew or should have known was incorrect. No evidence was presented by OWCP to establish that, at the time appellant received the November 14, 2015 deposit, he knew or should have known this payment was incorrect.

As noted above, the Board has held that the claimant may not have the requisite knowledge with respect to the first deposit payment after a return to work.²¹ The Board finds the evidence of record does not establish that appellant was at fault in accepting the initial payment deposited by EFT on November 14, 2015, a payment which provided wage-loss compensation for the period October 18 to November 14, 2015. The Board notes that the record contains no evidence that he knew or should have known on November 14, 2015 that this payment was incorrect. Additionally, appellant was entitled to some wage-loss compensation for the period October 18 to November 14, 2015 and thus the circumstances surrounding the overpayment were more complex than usual.²² A finding that appellant was not at fault with respect to the November 14, 2015 EFT deposit does not establish that he was entitled to waiver of recovery of the portion of the overpayment covered by the deposit, *i.e.*, October 19 to November 14, 2015.²³ On return of the case record, OWCP should properly consider the issue of waiver of this limited portion of the overpayment.²⁴

The Board has held that for subsequent payments through direct deposit, a claimant may be found to have accepted payments he or she knew or should have known to be incorrect.²⁵ OWCP had advised appellant in the May 12, 2015 letter that he could not receive compensation for total disability during a period he had returned to work.²⁶ By the time OWCP issued its December 12, 2015 direct deposit by EFT, appellant should have been aware that a deposit of compensation representing total disability was incorrect. After his receipt of the first direct

²¹ See *supra* note 17.

²² *V.D.*, Docket No. 16-0578 (issued November 3, 2016). Appellant would have been entitled to wage-loss compensation for lost time from work on October 18, 2015.

²³ *M.L.*, Docket No. 15-1683 (issued June 20, 2016).

²⁴ See *id.*

²⁵ See *supra* note 19.

²⁶ In the May 12, 2015 letter, OWCP informed appellant that, beginning May 3, 2015, he started receiving total disability compensation on the periodic rolls every 28 days. It advised him that, to minimize the possibility of an overpayment of compensation, he must notify it immediately of his return to work. OWCP informed appellant that, if he worked for any portion of the period for which he received compensation, he must return the payment even if he had already advised he was again working. It advised appellant that, for payments sent by EFT, a notification of the date and amount of payment appears on the statement from his financial institution and that he was expected to monitor his EFT deposits carefully, at least every two weeks.

deposit following his October 19, 2015 return to work, he was on notice that OWCP was making payments to him in error.²⁷

Appellant asserted that he felt the continuing payments represented some type of compensation payment for periods of wage loss prior to his October 19, 2015 return to full-time work. There is insufficient evidence of record to support this argument. The record does not indicate that appellant had a reasonable basis for believing that the deposited payments represented something other than continuing wage-loss compensation as forewarned in the May 12, 2015 letter from OWCP. During the February 7, 2017 prerecoupment hearing with an OWCP hearing representative, appellant testified that he believed that the EFT deposits he received from OWCP after his October 19, 2015 return to work constituted the amount of wage-loss compensation that OWCP owed him for December 2014 through June 2015. However, the evidence of record reflects that, by the time appellant received the November 14 and December 12, 2015 EFT deposits, all the monies due him for wage loss between February 28 and July 1, 2015 had been paid to him by July 25, 2015²⁸ and he had not established entitlement to wage-loss compensation for any period prior to February 28, 2015.²⁹ The Board accordingly finds that OWCP properly found appellant at fault in the creation of the overpayment of compensation which occurred due to the \$2,137.80 direct deposit by EFT which covered the period November 15 to December 12, 2015. Based upon the finding of fault for this period, appellant is not entitled to waiver of recovery of this portion of the overpayment.³⁰

CONCLUSION

The Board finds that OWCP properly determined that appellant received a \$4,226.31 overpayment of compensation for the period October 19 to December 12, 2015. The Board further finds that appellant was not at fault regarding the portion of the \$4,226.31 overpayment for the period October 19 to November 14, 2015, and the case is remanded to OWCP to determine whether waiver of the recovery of the overpayment is warranted. The Board further finds that OWCP properly found that appellant was at fault for the remaining portion of the \$4,226.31 overpayment of compensation for the period November 15 to December 12, 2015 and, therefore, is ineligible for waiver of recovery for this remaining portion.

²⁷ See *T.B.*, Docket No. 16-1807 (issued February 2, 2017).

²⁸ With regard to appellant's claim at the February 7, 2017 hearing that he still had not received wage-loss compensation for March 2015, the evidence of record reflects that, on April 3, 2015, he received an EFT deposit which covered wage loss for the period February 28 to March 27, 2015 and that, on April 24, 2015, he received an EFT deposit which covered wage loss for the period March 28 to April 17, 2015.

²⁹ *Supra* note 6.

³⁰ See *supra* notes 14 and 15.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded to OWCP for further consideration consistent with this decision.

Issued: September 18, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board